

1 Gregg S. Kleiner, State Bar No. 141311
RINCON LAW LLP
2 268 Bush Street, Suite 3335
San Francisco, California 94104
3 Telephone No.: 415-672-5991
4 Facsimile No.: 415-680-1712
Email: gkleiner@rinconlawllp.com

5 Counsel for KARI BOWYER,
6 Trustee in Bankruptcy

7
8 UNITED STATES BANKRUPTCY COURT
9 NORTHERN DISTRICT OF CALIFORNIA
10 SAN JOSE DIVISION

11 In re

12 SERGIO ROLDAN
13 *aka* SERGIO RAFAEL ROLDAN
AND
14 ADRIANA M BUENAVENTURA
15 *aka* ADRIANA MARIA LONDONO,
16 Debtors.

Case No. 17-50794 MEH
Chapter 7

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
MOTION FOR ORDER AUTHORIZING
SALE OF REAL PROPERTY FREE AND
CLEAR OF LIENS, CLAIMS AND
INTERESTS OF BANK OF AMERICA
(1050 Ortega Circle, Gilroy, California)**

Date: May 2, 2019

Time: 10:30 a.m.

Place: 280 South First Street, Ctrm. 3020
Hon. M. Elaine Hammond
San Jose, CA 95113

21 Kari Bowyer, Chapter 7 Trustee ("Trustee") of the estate of Sergio Roldan and Adriana
22 Buenaventura ("Debtors") files this memorandum of points and authorities in support of her motion
23 for an order authorizing her to sell real property commonly referred to as 1050 Ortega Circle, Gilroy,
24 California ("Property"), free and clear of all liens, claims and interests of Bank of America, N.A.
25 ("Bank"). As set forth in the Trustee's concurrently filed and served sale motion, the Trustee is
26 party to an agreement to sell the Property to Gary R. Schenone and Karen W. Schenone (or their
27 assigns) (collectively, "Buyer") for \$590,000, subject to overbid.

28 ///

1 **I. BACKGROUND**

2 The Debtors filed a Voluntary Petition under Chapter 7 on April 3, 2017 (the “Petition
3 Date”). Soon thereafter, the Trustee was appointed to administer the Debtors’ estate. On May 3,
4 2017, the Trustee filed a no asset report with the Bankruptcy Court. On July 6, 2017, the Bankruptcy
5 Court closed the Debtors’ case. On January 3, 2018, the Office of the United States Trustee filed a
6 motion to reopen the Debtors’ Case. The Debtors’ case was reopened on January 3, 2018 and the
7 Trustee was re-appointed as the Chapter 7 Trustee of the Debtors’ case.

8 The Debtors’ case was reopened because the Debtors had failed to include among their
9 scheduled assets their interest in promissory note executed by Burt and Loretta Birmingham
10 (collectively, “Birmingham”), the prior owners of the Property. The Birmingham obligation to the
11 Debtors was secured by a deed of trust encumbering the Property, recorded on March 22, 2007, with
12 the Santa Clara County Recorder’s Office, Instrument No. 19352696 (“Roldan DOT”). On the
13 Petition Date, the Bank was the beneficiary of a deed of trust that it recorded against the Property
14 on May 16, 2013, Instrument No. 22222974 (“Bank DOT”), which deed secured a promissory note
15 in the approximate amount of \$425,190.00.

16 At the time that the Debtors’ case was reopened the Roldan DOT was the subject of litigation
17 entitled *Bank of America, N.A. v. Sergio Roldan, et al.*, Case No. 17CV313114, pending before the
18 Santa Clara County Superior Court (the “Litigation”). Through the Litigation, the Bank seeks,
19 among other things, to quiet title in the Property by asserting that the Bank DOT against the Property
20 is senior in priority to the Roldan DOT. The Trustee understands that the Bank asserts that the Bank
21 DOT should relate back in time to its 2006 deed of trustee the Bank recorded against the Property
22 (“2006 DOT”). The Bank reconveyed the 2006 DOT to Birmingham *prior* to recording the Bank
23 DOT. The Trustee is informed that at the time the Litigation was commenced, the Bank recorded a
24 *lis pendens* against the Property on July 17, 2017, as Instrument No. 23698959 (“Lis Pendens”).

25 Among other things, the Trustee understands that the Litigation sought to prevent the
26 completion of a non-judicial foreclosure sale of the Roldan DOT. To that end, the Bank sought and
27 obtained a temporary restraining order in December 2017 (“TRO”). On June 8, 2018, Superior Court
28 entered an order dissolving the TRO. On June 15, 2018, a non-judicial foreclosure sale of the

1 Property was conducted (“Foreclosure”). The Debtors’ estate was the successful bidder at the
2 Foreclosure. On September 12, 2018, a Trustee Deed was recorded with the Santa Clara County
3 Recorder’s Office, as Instrument No. 24022397 (“Trustee Deed”), vesting title for the Property in
4 the name of the Trustee, solely in capacity as Trustee of the Debtors’ estate. The Trustee is in
5 contract to sell the Property to the Buyer. The Trustee seeks to sell the Property free and clear of
6 the Bank DOT, the 2006 DOT, the Lis Pendens and all other liens, claims and interests that the Bank
7 may or could assert against the Property.

8 **II. ARGUMENT**

9 Section 363(f)(4) of the Bankruptcy Code authorizes a Trustee to sell property free and clear
10 of liens and interests that are subject to a *bona fide* dispute. 11 U.S.C. § 363(f)(4). Among other
11 things, the Trustee contends that any claim, lien or interest asserted by the Bank is disputed and is
12 not enforceable against the Property because the Bank DOT was recorded after the Roldan DOT
13 and, as a consequence of the Foreclosure, was wiped out and the Bank is now a sold-out junior
14 lienholder. *Bank of Am. v. Graves*, 51 Cal. App. 4th 607, 611-612 (1996) (“The term ‘sold-out
15 junior lienor’ refers to the situation in which a senior lienholder forecloses its lien, eliminating the
16 junior lienor's security interest. ‘A senior foreclosure sale conveys the property free of all junior
17 liens Thus, the junior no longer has a lien on the property, and the security has been entirely
18 destroyed. A sold-out junior thus holds security that has 'become valueless' and is permitted to sue
19 directly on the note.’” (Bernhardt, Cal. Mortgage and Deed of Trust Practice (Cont.Ed.Bar 2d ed.
20 1990) § 4.8, pp. 193-194.)) See, Exhibit A, Declaration of Kari Bowyer in Support of Motion for
21 Order Authorizing Sale of Real Property Free and Clear of Liens, Claims and Interests (1050 Ortega
22 Circle, Gilroy, California)(“Bowyer Declaration”).

23 To the extent that the Bank asserts that the Bank DOT is otherwise enforceable against the
24 Property by theories, including equitable subrogation, the Trustee submits that the Bankruptcy
25 Code’s avoidance powers under 11 U.S.C. § 544 empower her, as a hypothetical judgment creditor,
26 to assert a hypothetical judgment lien in a position superior to the Bank DOT.

27 In order for a *lis pendens* to be effective, the Bank was required, “prior to the recordation
28 of the notice...” to serve the notice of *lis pendens* by “...certified mail, return receipt requested,

1 ...” on “...all known addresses of the parties to whom the real property claim is adverse and to
2 all owners of record of the real property affected by the real property claim” C.C.P. § 405.22.
3 Based on information available to the Trustee, the Lis Pendens is void and invalid because the Lis
4 Pendens was served after the Lis Pendens was recorded and was never served on the Trustee. See,
5 Exhibit B, Bowyer Declaration, a copy of the recorded Lis Pendens and the Bank’s Certificate of
6 Service.

7 Failure of the Bank to properly serve the Lis Pendens is fatal. The *lis pendens* “shall be
8 void and invalid as to any adverse party or owner of record unless the requirements of Section
9 405.22 are met” Simply put, because the Bank did not, prior to the recordation of the Lis
10 Pendens, serve the Debtors and other interested parties by certified mail, return receipt requested,
11 the Lis Pendens is void and invalid and therefore must be expunged. *Ray v. Rosien*, 238 Cal. App.
12 4th 845, 855 (2015) *accord Ray Sanchez Investments v. Superior Court of San Bernardino County*,
13 244 Cal. App. 4th 259, 263-264. (Holding the Debtor’s failure to properly serve the *lis pendens* on
14 affected parties rendered the *lis pendens* void and invalid and distinguishing this outcome from
15 *Biddle v. Superior Court*, 215 Cal. Rptr. 848 (1985) (*Biddle* holding that a defendant may waive
16 the right to raise a technical default if it waits for a year to assert the default as part of its
17 justification for expungement.)

18 Furthermore, to the extent that the Bank DOT and/or the Lis Pendens are determined to be
19 enforceable against the Property, the Trustee estimates that the net proceeds generated from the sale
20 of the Property are sufficient to pay off the Bank’s lien in full. Assuming there are no overbids, the
21 Trustee estimates that the net to the Debtor’s estate after costs and commissions is equal to
22 approximately \$560,000. Bowyer Declaration, ¶ 9. The Trustee is informed that the sums currently
23 owed to the Bank under the note that was once secured by the Bank DOT is approximately \$386,000.
24 Bowyer Declaration, ¶ 10. Because the net sale proceeds are adequate to pay off the disputed lien,
25 the Property can be sold free and clear of the disputed lien pursuant to 11 U.S.C. § 363(f)(3). That
26 section provides that the Trustee may sell property free and clear of liens if “such interest is a lien
27 and the price at which such property is to be sold is greater than the aggregate value of all liens on
28 such property.” *Id.*

1 **III. CONCLUSION**

2 The Trustee has demonstrated that the Bank of America, N.A. lien is in bona fide dispute
3 and the Trustee should be authorized to sell the Property free and clear of the disputed lien pursuant
4 to 11 U.S.C. § 363(f)(4). Alternatively, the Trustee has demonstrated that there will be adequate
5 sale proceeds to pay off the disputed lien should the Court ultimately conclude that the lien attached
6 to the Property and is an obligation of the Debtor's estate. 11 U.S.C. § 363(f)(3).

7 The Trustee prays for an order: (i) authorizing her to sell the Property free and clear of any
8 and all liens, claims or interests of the Bank, including, but not limited to the Bank DOT and the Lis
9 Pendens, with the sale order to provide that any liens, claims or interests of the Bank to attach to the
10 sale proceeds generated from the Property with the same right and priority that existed, if any, prior
11 sale of the Property; (ii) authorizing the Trustee and representatives of the Bank to try to resolve
12 their dispute with regard to the Bank's disputed liens within 60 days after the sale of the Property
13 closes (or such additional time as the parties mutually agree); and (iii) requiring the Trustee to
14 initiate an adversary proceeding in the Bankruptcy Court to determine the extent, validity and
15 priority, if any, of the Bank's disputed claims if the parties are unable to resolve their dispute.

16
17 DATED: April 3, 2019

RINCON LAW LLP

18
19
20 By: /s/ Gregg S. Kleiner

GREGG S. KLEINER

Counsel for KARI BOWYER,

Trustee in Bankruptcy
21
22
23
24
25
26
27
28